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No. 88-950

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CAROLE L. PAGE,
Petitioner,

v.

E. I. DU PONT DE NEMOURS & COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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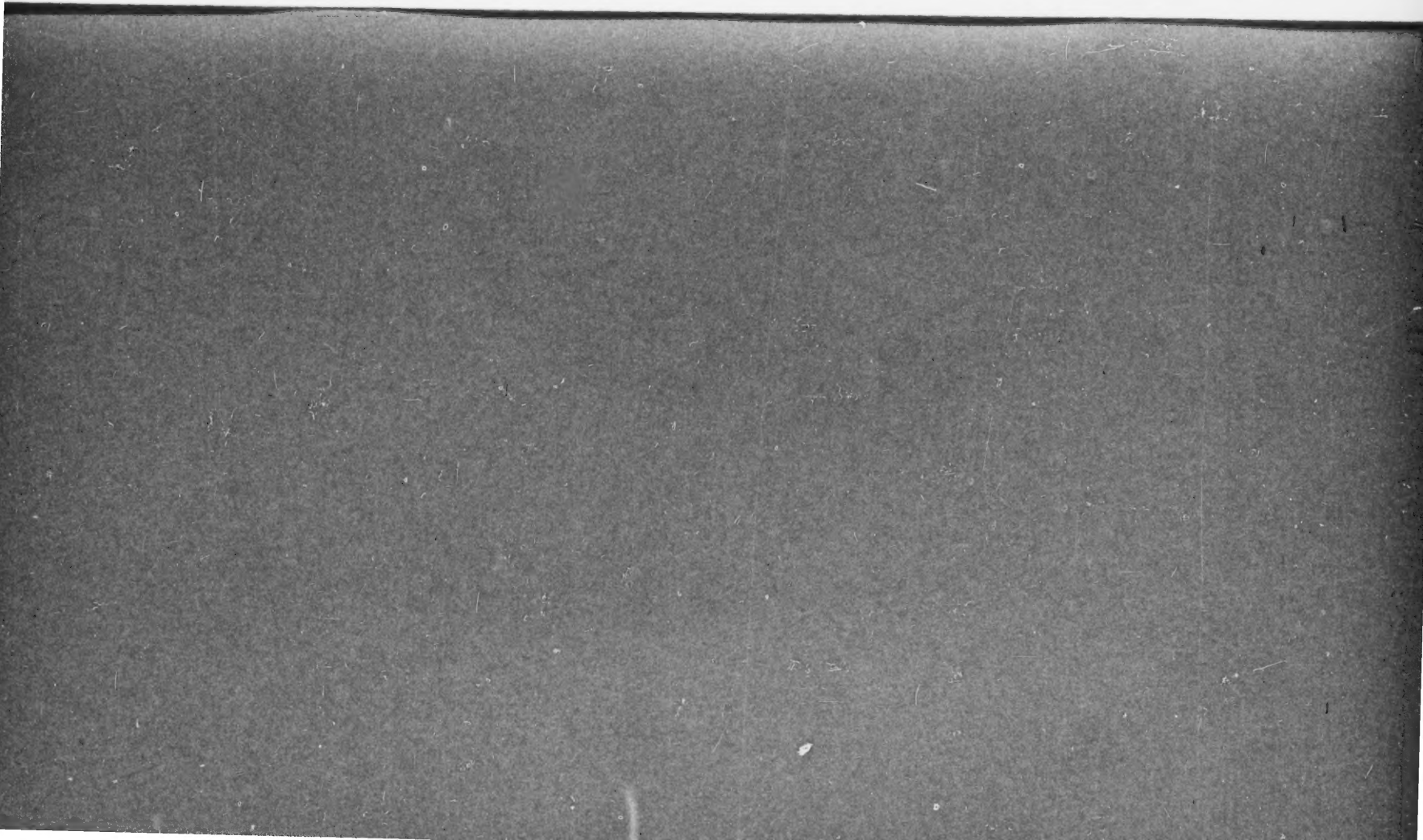

QUESTIONS PRESENTED

1. Whether certiorari is warranted for the purpose of reviewing the extensive factual findings of the trial court affirmed by the court of appeals, without an obvious and exceptional showing of error.

2. Whether certiorari is warranted for the purpose of addressing an issue not presented by the record in the case.

LIST OF PARTIES

The following companies are less than wholly owned subsidiaries or affiliates of E. I. du Pont de Nemours & Company, Inc.:

BT&D Technologies; Canadian Harvest; Du Pont Canada Inc.; Du Pont EniChem Gas Piping Systems S.p.A.; Du Pont—Idemitsu Co., Ltd.; Du Pont Lanxide Composites Inc.; Du Pont—MGC Co., Ltd.; Du Pont—MRC Company, Ltd.; Du Pont—Mitsui Fluorochemicals Company, Ltd.; Du Pont—Mitsui Polychemicals Company, Ltd.; Du Pont —Norol Maintenance Services A.S.; Du Pont—Sankyo Pharmaceuticals Co., Ltd.; Du Pont—Showa Denko Co., Ltd.; Du Pont—Toray Company, Ltd.; DuCon; DUSA Endustriyel Iplik Sanagi Ve Ticaret A.S.; DX Imaging; GMT, L. P.; Holland Ethylene Copolymers C.V.; Holland Ethylene Copolymers Management B.V.; IDAC—Automotive Coatings Companies; NIACHLOR; Nypol S.A.; Oncogenetics Partners; Optical Disc Mastering (ODM-VOF); PD Glycol Limited; Philips and Du Pont Optical Company (PDO-US); Philips and Du Pont Optical Company (PDO-NL); PROCOMP; Sclavo S.p.A.; SeparaSystems, Inc.; Societe En Nom Collectif Du Pont de Nemours; Advanced Genetic Sciences, Inc.; Agar Cross; Aldusa S.A.; A.V.R.—Chemie C.V.; A.V.R.—Chemie Bouw B.V.; Avtek Corporation; Biotech Research Laboratories, Inc.; Cine Film Systems; Delaware River Cooperative; Derivados Sinteticos, S.A. de C.V.; DNA Plant Technology Corporation; Dunlena Pty. Limited; Du Pont—TOA Co., Ltd.; Gemeinnutzige Wohnungsbau GmbH; Greyhawk Systems, Inc.; Haemonetics Corporation; HEM Research, Inc.; ImagiTex Incorporated; Industrias Tecnos, S.A. de C.V.; Ingenieurgesellschaft Fur Agragtetechnik und Verkehrsfahrzenge GmbH; La Domincia, S.A. de C.V.; Lanxide Armor Company; Laserscope Corporation; Molecular Biosystems Inc.; Newbridge Networks Corporation; Norcom Du Pont Thermoplastic Composites of Northeast; Nylon de Mexico, S.A.; Per-

ceptive Systems Incorporated; P.T. Peroxida Indonesia Pratama; POC Research Corporation; Quimica Fluor, S.A. de C.V.; Reactivos Minerales Mexicanos S.A. de C.V.; Tetraetilo de Mexico, S.A.; Thapar—Du Pont Limited; Thapar Du Pont Spandex Ltd.; Tintas Renner S.A.; TVS Du Pont Electronics Ltd.; Water Membrane Manufacturing Co., Ltd.

All other parties in this matter are set forth in the caption.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, E. I. du Pont de Nemours & Company, Inc., opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

APPLICABLE REGULATORY PROVISIONS

In addition to the relevant provisions of Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e *et seq.* (1964)) cited in the petition at pages 2-3, the relevant provisions of the regulations of the Equal Employment Opportunity Commission (EEOC) (29 C.F.R. § 1604.11 (1985)) are as follows:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.
>
> * * * *
>
> (d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents, or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(footnote omitted).

STATEMENT OF THE CASE

The Petitioner Carole L. Page (Page) was employed by the Respondent E. I. du Pont de Nemours & Company, Inc. (Du Pont) at its Florence, South Carolina facility as a Production Operator from March 23, 1981 to August 2, 1985 (All).[1] Page's employment was remarkable for her significant absenteeism for health reasons as well as clashes with supervision and co-workers, all of which began early in her employment.

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[1] References to the opinions below are designated by "A," followed by the appropriate Appendix page number.

On July 30, 1984, a co-worker touched Page in a sexual manner (A43). Page told another co-worker about the incident and, at his urging, reported the incident to supervision (A43-A44). At Page's request, her supervision confidentially investigated the incident that morning and had the offending co-worker apologize to Page (A44-A45). Page also reported the incident to higher management, who assured Page of a thorough investigation (A45-A46). Pursuant to its established written policy prohibiting sexual harassment, Du Pont placed the offending co-worker on probation, counselled with Page, and informed all of Page's co-workers on several occasions that they were expected to put the incident behind them and work together as a team (A47, A51-A54). Page herself, however, thereafter engaged in antagonistic conduct toward her co-workers, repeatedly raising the touching incident and threatening to have her co-workers fired if they ever touched her and she was not absolutely sure it was accidental (A50-A51).

On August 2, 1985, after a five month absence from work, Du Pont terminated Page on the grounds of her unsuitability for industrial employment, based on her current and projected future inability to perform her regular job assignment for health reasons (A57).

Page filed an administrative charge of discrimination and a subsequent lawsuit on which the present petition is based.[2] Page claimed that she was subjected to a sexually hostile work environment and was terminated because of her sex and in retaliation for complaining about sexual harassment in violation of sections 703 and 704 of Title VII, 42 U.S.C. §§ 2000e-2, 2000e-3 (1964) (A59-A60).

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[2] It is noteworthy that most of the conduct of which Page complains, including the single, isolated sexual touching, occurred outside the statutory limitations period (A59-A61).

The case was tried for eight days, during which an extensive record of testimony and documentary evidence was compiled. The trial court issued an exhaustive analysis of the case in an order setting forth findings of fact, including credibility determinations, and conclusions of law (A9-A83).

Specifically, the trial court found that only one incident of unwelcome sexual conduct occurred and was reported to management (A71).[3] Du Pont remedied that single, isolated incident quickly, completely, and decisively (A44-A47, A51-A54).

Page also claimed that non-sexual incidents occurred and contributed to the alleged hostile environment sexual harassment. The court found, however, that with respect to absenteeism and treatment by supervisors, Page was not treated differently from similarly situated male employees (A15, A17, A37, A57, A58, A67-A68, A74, A76, A79-A80). The trial court also found that, with respect to other alleged acts, Page "greatly overexaggerated or misconstrued these and other alleged incidents or occurrences," and found further, on the basis of credibility determinations, that some incidents simply did not occur (A66-A69).[4] The trial court additionally found that

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[3] The Petitioner has argued only selected facts, including those expressly rejected in the factual findings and credibility determinations of the trial court affirmed by the court of appeals. She has also misrepresented record facts. The most serious and material of these misrepresentations is the statement that "Page complained about . . . obscene graffiti in her bathroom." (Petition at p. 17). As counsel for the Petitioner is well aware, the district court found that "there is no indication in the record that plaintiff ever reported this occurrence to anyone." (A48-A49, A71). The court of appeals affirmed this finding (A5).

[4] Although Page would have this Court believe that those alleged acts related to or were precipitated by the sexual touching, the record evidence clearly establishes that most of the alleged acts occurred substantially *before* the touching incident and were unrelated in any way to the incident (A12-A14, A24-A25, A27-A30).

any events which did occur were caused by Page's mistrust of supervision, her difficulty in dealing with people, and the threatening and intimidating conduct which she directed toward her co-workers (A69-A70, A79).

Noteworthy to this proceeding, the trial court specifically found that any alleged harassing conduct did not occur because of Page's sex (A70). To the extent that co-workers were reluctant to work with Page after the incident and such conduct could be considered harassing, the trial court found that Du Pont took "prompt remedial action reasonably calculated to end [any] harassment." (A70-A71).

The trial court also found that Page was not terminated because of her sex or in retaliation for complaining about sexual harassment. Specifically, the trial court found that Page was not qualified for her position because of her excessive abenteeism, and that Du Pont's determination of Page's unsuitability for her position and consistent treatment of similarly situated employees constituted proof of a non-pretextual, legitimate non-discriminatory reason for her termination (A72-A77). With respect to Page's retaliation claim, the trial court found no causal link between Page's complaint and the alleged subsequent harassment or her termination (A78-A79). The trial court also found that Du Pont's conduct in ensuring a non-hostile environment and its legitimate non-discriminatory reason for Page's termination would overcome any inference of retaliation (A80-A82).

The trial court entered judgment in favor of Du Pont on all of Page's claims (A82). Following briefing and oral argument by both parties, the court of appeals affirmed the judgment in all respects (A8).

SUMMARY OF THE ARGUMENT

Page has set forth four "questions presented" in her petition (Petition at pp. i-ii). None of those questions articulates any reason of the character which would warrant this Court's exercise of its discretion to grant a review on writ of certiorari.

Three of the questions Page presents in essence request this Court to conduct a third review of the extensive trial record in this case to try to find proof of actionable sexual harassment and retaliation which the trial court, in its exhaustive analysis, and the court of appeals, on review, could not find. Page's extensive factual arguments and selected lengthy testimony excerpts reveal that her true purpose is only to obtain this factual review. The courts below gave the factual and legal issues in the case full consideration and decided them accurately and fairly. The factual findings and credibility determinations of the trial court, affirmed by the court of appeals as "amply supported by the record and . . . not clearly erroneous" (A6, A7, A8), are entitled to great weight. Page's request for a new review of facts and credibility to resolve specific factual questions which have no significance to any case other than the present case or to anyone other than the parties to the present case, without any obvious and exceptional showing of error, does not present a proper basis for certiorari, and the writ should therefore be denied.

The fourth question stated by the Petitioner purports to raise an issue of the type of evidence which may be considered in determining whether a sexually hostile work environment exists (Petition at p. i, question 1). The question does not state, however, how the issue is raised by the record of the present case. Indeed, the issue is not raised by the record of the present case. The very standard the Petitioner urges should be applied was, in fact, applied by the district court (A69). The court of appeals' decision contained no holding that the district court should have used a more restrictive test;

rather the court of appeals affirmed the district court's factual findings and legal conclusions. The question urged by the Petitioner simply is not presented on the record of the present case, and certiorari should therefore be denied.

ARGUMENT

The Petitioner's Request For Factual Review Is Not A Proper Basis For Certiorari

The district court below conducted an eight day trial during which it observed the demeanor of witnesses, heard testimony, and reviewed voluminous exhibits. After extensive briefing by the parties, and "[a]fter receiving the testimony, carefully considering the entire record, weighing the credibility of the witnesses, reviewing the exhibits, and studying the applicable law," the trial court issued an exhaustive factual and legal analysis of the case (A9-A83). The district court entered judgment in favor of Du Pont on all of Page's claims, finding no proof of actionable hostile environment sexual harassment or retaliation (A83). The trial court's findings were accurate and fair. On review, the court of appeals found the trial court's analysis "careful and detailed," "painstaking[]," even on trivial claims, "amply supported by the record," "not clearly erroneous," and "excellent" (A6-A8). The court of appeals affirmed the judgment in all respects (A8).

Page has asked this Court to grant certiorari to review—for a third time—the extensive trial record to find proof that Page was subjected to a sexually hostile environment and retaliated against after the single, isolated sexual touching, and to find proof that Du Pont did not take remedial action (Petition at p. i, questions 2 and 3).[5] The questions themselves make clear that

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[5] Page's fourth question, generally alleging "plain error" and summarily briefed, is simply duplicative of her second and third questions urging review of particular factual issues, and makes no specific showing of error (Petition at pp. 60-61).

Page's purpose is to seek a factual review, and her argument reveals that purpose even more clearly. The sections of the petition addressing these questions consist solely of factual recitation and argument, as well as extensive selected quotations of trial testimony (Petition at pp. 37-60). Inasmuch as Page seeks only another factual review of the record to resolve questions already thoroughly and correctly resolved and affirmed and of importance only to the parties in the present case, certiorari should be denied.

This Court has traditionally accorded great weight to the factual findings of a district court approved by a court of appeals. *E.g., National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 n. 15 (1984). Indeed, it is the "settled practice" of this Court to accept factual findings in which both the district court and the court of appeals have concurred, even if they are claimed to be clearly erroneous, except in the "most exceptional circumstances." *Branti v. Frankel*, 445 U.S. 507, 512 n. 6 (1980); *accord, Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). The Supreme Court, as "[a] court of law . . . rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *accord, Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2623 (1987); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n. 5 (1985). Where there are no constitutional issues present and "resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court," there is particular force to the traditional rule of deference. *Berenyi v. District Director, INS*, 385 U.S. 630, 636 (1967); *see*

Anderson v. Bessemer City, 470 U.S. 564 575 (1985) (factual findings entitled to great deference, and findings based on credibility determinations "can virtually never be clear error"). Accordingly, certiorari is "not warranted merely to review the evidence or inferences drawn from it" under such circumstances. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

In the present case the factual findings Page seeks to have this Court review were made by the trial court largely based on credibility determinations. There is ample support in the record for the findings. After careful review and oral argument by both parties, the court of appeals concurred in the findings. There are no constitutional issues. Page has made no "obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. at 275. Accordingly, certiorari is not appropriate and should be denied.

The Petition Raises A Question Not Present In This Case

Page argues intensely in her petition that the courts below erred in holding that hostile environment sexual harassment as recognized in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), may be proved only by sexual incidents, as the Sixth Circuit Court of Appeals held in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 1983 (1987), rather than by sexual and non-sexual incidents, as the District of Columbia Circuit Court of Appeals held in the pre-*Meritor* case, *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985). The record clearly shows, however, that the trial court in fact applied the more liberal *McKinney* standard and considered each alleged incident in determining whether Page proved a claim for hostile environment sexual harassment. The court of appeals affirmed the judgment in all respects. Simply stated, this case does not warrant a grant of

certiorari to resolve this question because the record does not present the question. *United States v. Rimer*, 220 U.S. 547, 548 (1911); *accord, Needleman v. United States*, 362 U.S. 600 (1960); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 329 (1945).

The record of the present case shows clearly that the district court carefully and thoroughly analyzed the facts claimed in support of Page's hostile work environment sexual harassment claims. The trial court began its analysis by defining the cause of action as established by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. at 66-67, and by citing to the EEOC regulations adopted by the Court in that case, 29 C.F.R. § 1604.11 (1985) (A61-A62). The court below continued its analysis by setting forth the two step standard of proof for a hostile work environment sexual harassment claim used by the Fourth Circuit Court of Appeals in *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (A63). The trial court noted that other courts of appeal have required a plaintiff to prove a greater number of specific elements, but rejected that more stringent standard in favor of the *Katz* analysis in the present case (A63-A64, citing *Rabidue v. Osceola Refining Co.*, 805 F.2d at 619-20 and *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)).

The trial court then proceeded to analyze each of Page's allegations under the *Katz* standard, beginning with the allegations of sexual conduct (A65-A66). The trial court found that those allegations did not satisfy the *Katz* standard or the admonition of *Meritor* that the alleged harassment "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." (A65-A66).

Contrary to Page's representation of the record in her petition, the trial court then proceeded to analyze whether the alleged non-sexual workplace incidents, taken together

with the single, isolated reported sexual touching, proved hostile environment sexual harassment (A66-A70). The trial court painstakingly analyzed each of the alleged incidents, based on its findings of fact with respect to each incident, under the very standard Page urges this Court to find that the trial court should have used. As the trial court stated, "plaintiff would have to show that, but for her sex, the alleged harassment would not have occurred." (A69, citing *McKinney v. Dole*, 765 F.2d at 1138). The trial court found that Page had failed to prove that any of the incidents occurred because of her sex (A69-A70). The court proceeded even further to find that even if Page had satisfied the threshold requirement of the *Katz* analysis that sexually harassing incidents had occurred, she failed to prove the second step, that Du Pont failed to take prompt remedial action with respect to the touching incident or the later alleged non-sexual incidents (A70-A71).

At no point in its analysis did the trial court hold that only overtly sexual conduct could be considered in determining whether Page proved hostile environment sexual harassment. In fact, the trial court considered all of the alleged incidents, including specifically the non-sexual incidents, in determining whether Page proved that they occurred because of her sex and, taken together, constituted hostile environment sexual harassment. The court of appeals affirmed the trial court's judgment in all respects, and made no pronouncement that the trial court should have used a stricter standard and considered only overtly sexual acts in determining whether Page had proved her claim. The error Page claims therefore simply is not present on the record.[6]

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[6] Inasmuch as there is no substantive legal issue raised on the record, it is not appropriate for the Respondent to engage in a discussion in this brief on the type of evidence which will support a finding of hostile environment sexual harassment.

The record is abundantly clear that the issue Page has asked the Court to review is not present on the record. Accordingly, certiorari should be denied.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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